IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

NORBY V. FARNAM BANK

VIRGINIA NORBY ET AL., APPELLANTS,
V.
THE FARNAM BANK ET AL., APPELLEES.

Filed April 6, 2010. No. A-09-814.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Steve Windrum for appellants.

Brian J. Davis and Claude E. Berreckman, Jr., of Berreckman & Davis, P.C., for appellee The Farnam Bank.

Stanley R. Parker and Timothy A. Shultz, of Parker & Hay, L.L.P., for appellees Donnie L. Franzen and Karen Widick.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

This is the third appearance of this case before us. The genesis of this case was a replevin of livestock which was issued by the Frontier County District Court against Keith Norby, who is married to the appellant Virginia Norby. The plaintiffs, Virginia Norby; Darin Norby; V.C.V.D., Inc.; and Virginia Norby, as trustee of KG Triple D Farms Trust, filed this action in the Dawson County District Court alleging several causes of action as a result of the seizure and removal of livestock allegedly owned by the plaintiffs, rather than by Keith Norby. After our opinions in the two previous appeals, the plaintiffs' only remaining cause of action was a 42 U.S.C. § 1983 (2006) action. The Dawson County District Court granted the motions for summary judgment filed by the defendants, The Farnam Bank (Bank), Donnie L. Franzen, and Karen Widick. Thus, the plaintiffs' second amended petition and the case were dismissed, which brings us to this third and, ultimately, final appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In the interest of judicial efficiency, we refer the parties and any other interested readers to our lengthy "Memorandum Opinion and Judgment on Appeal" in *Norby v. Farnam Bank*, filed on April 11, 2006, in case No. A-04-1171 (*Norby I*), and our "Memorandum Opinion and Judgment on Appeal" in *Norby v. Farnam Bank*, No. A-07-656, 2008 WL 582510 (Neb. App. Mar. 4, 2008) (selected for posting to court Web site) (*Norby II)*. Those opinions comprehensively set forth the factual background of this case. That said, we attempt to reduce the factual background for this appeal to its essence.

As a result of a security agreement with the Bank signed by Keith Norby, he pledged "all livestock" and "offspring" now owned or hereafter acquired as collateral. The agreement was dated February 11, 1998, and filed with the Secretary of State the next day. It was later amended to include two registered quarter horses with colts. There was default upon the underlying notes, and as a result, the Bank filed a petition in replevin in the Frontier County District Court resulting in the issuance of two orders of replevin. Simplified, the plaintiffs' claim in *Norby I* was that livestock not belonging to Keith Norby, but to one or more of the plaintiffs, was taken as a result of the replevin orders. The case was tried against all defendants except the Frontier County sheriff, Dan Rupp, and a jury verdict was rendered in favor of Darin Norby in the amount of $6,100, which verdict we affirmed in *Norby I*.

There was no trial as to Rupp because in the course of the pretrial proceedings, the trial court had sustained a demurrer filed by Rupp with respect to the plaintiffs' § 1983 claim against him. In *Norby I*, we found that the trial court had erred in sustaining the demurrer on the § 1983 claim and we remanded that cause of action to the district court with directions to reinstate such claim. However, in *Norby II*, it was ultimately determined that Rupp was entitled to qualified immunity on the § 1983 claim against him. Summary judgment was granted in favor of Rupp, and the case was dismissed as to him.

The instant appeal is the third appearance of this case before us. As stated previously, in our *Norby I* decision, we found that the trial court had erred in sustaining the demurrer on the § 1983 claim and we remanded that cause of action to the district court with directions to reinstate such claim. Examination of the operative pleading, the second amended petition, filed March 1, 2004, shows that the format of such pleading was to set forth in 25 paragraphs the factual allegations surrounding the replevin action by which livestock was seized. With respect to the § 1983 cause of action which was the subject of our remand, the plaintiffs' pleading simply realleged paragraphs 1 through 25 as though fully set forth and then asserted in paragraph 34:

> The acts and omissions of the defendants, and each of them, is a deprivation of the Plaintiffs' interest in their property as hereinabove alleged, without due process of law, and under color of law, in accordance with Title 42 U.S.C. § 1983 and Plaintiffs have been damaged thereby, for which the Plaintiffs are entitled to such damages as hereinabove alleged, for punitive damages, together with attorney fees by reason thereof, as provided in said section, as more particularly set forth in the prayer hereafter.

After our decision in *Norby I*, it is only this § 1983 claim against the Bank, Franzen, and Widick which still had "life." Thus, the claim against the Bank, Franzen, and Widick was that they took

possession of livestock belonging to one or more of the plaintiffs "without due process of law." We note that at all times relevant, Franzen was the president of Farnam Bank. At the time of the hearing on the motion for summary judgment, Widick was vice president of the bank; but at the time of the replevin action, she was the assistant vice president.

On August 19, 2008, the Bank, Franzen, and Widick filed motions for summary judgment based on our opinion in *Norby II*. In its order filed on December 16, 2008, the district court denied the summary judgment motions of the Bank, Franzen, and Widick, finding that our decision in *Norby II* did not address any claims concerning the § 1983 action against the private party defendants. After analyzing federal case law, the district court found that the principles of qualified immunity which absolved Rupp, a law enforcement officer, from liability did not automatically apply to the Bank, Franzen, and Widick. The district court therefore declined to extend our decision in *Norby II* to the Bank, Franzen, and Widick.

The Bank, Franzen, and Widick then amended their answers to the plaintiffs' second amended petition by adding the affirmative defense of good faith reliance on Nebraska's laws, including Nebraska's replevin statutes. In May 2009, the Bank, Franzen, and Widick again filed motions for summary judgment, claiming that no genuine issues as to any material fact existed and that they are entitled to judgment as a matter of law.

After a hearing on the matter, the district court filed its order on July 29, 2009, granting summary judgment in favor of the defendants. The district court found by inference that neither Virginia nor Darin possessed any personal knowledge of any conduct between the sheriff, Rupp, and the defendants, other than that which each testified to at the 2004 trial. The district court found that the Bank's invocation of the state-created replevin procedures involving the seizure of property by Rupp, the "state officer," satisfies the "state action" requirement for a § 1983 claim. The district court also found upon examination of the 2004 trial testimony that there was no genuine issue of material fact relating to "the total absence of any conduct from which it can be established that [the defendants] took any action to advise, control, direct, or interfere with Rupp's discharge of his duties under the replevin order" or with Rupp's effort to return cattle when he determined they were not subject to the replevin order. The district court found that there was no agreement of any kind or any "meeting of the minds" between Rupp and the defendants to engage in conduct that violated the plaintiffs' constitutional rights. The district court said:

> The uncontroverted evidence from Franzen and Widick, found both in their 2004 trial testimony and in exhibits 170 and 171, was that while each was present at the cattle roundup, neither did any act from which it could be proved or even inferred that either was acting "together with" or "receiving significant aid" from a state official to deprive any plaintiff of a constitutional right.

The district court concluded that under Nebraska law, the plaintiffs had the right to intervene in the replevin action and such opportunity provided protection for their due process rights to claim that their property had been wrongfully taken by the sheriff--effectively holding that the plaintiffs' § 1983 claim failed because there was no deprivation of their constitutional right to due process. The district court said that if such right of intervention was not adequate to fully protect the plaintiffs' constitutional rights, the defendants had alleged as an affirmative

defense to liability that each defendant acted at all times in "good faith" reliance on the laws of Nebraska, including, but not limited to, the laws relating to replevin.

Noting that good faith requires both subjective and objective elements, the district court found that (1) the defendants adduced sufficient evidence to establish that each believed he or she was acting according to a lawful order from the Frontier County District Court as well as in reliance on Rupp's efforts to follow the command of the court's order, and plaintiffs did not offer any evidence to rebut this evidence of the defendants' subjective beliefs and (2) there is no genuine issue of material fact as to whether the defendants' belief was objectively reasonable. As to whether such belief was objectively reasonable, the district court found that evidence established without any genuine issue of fact that the defendants did nothing to control, direct, interfere with, or in any other way become involved with Rupp's efforts to follow the command of the replevin order or Rupp's efforts to return the cattle when he realized the cattle were not subject to the order. The district court said that the evidence led to only one conclusion: the defendants did not have any reason or basis either to know or from which they should have known that the plaintiffs' right to intervene in the replevin action did not adequately protect the plaintiffs' constitutional rights.

Therefore, the district court found that the defendants were entitled to judgment as a matter of law and granted their motions for summary judgment on the § 1983 claims. The district court dismissed the plaintiffs' second amended petition and the final remaining cause of action. The plaintiffs now appeal from this dismissal.

ASSIGNMENTS OF ERROR

The plaintiffs allege 13 assignments of error, which we condense and summarize into four. The plaintiffs allege that the district court erred in (1) sustaining the defendants' motion for summary judgment and in making various findings and conclusions; (2) finding that the defendants met their burden of proof in respect to good faith as an affirmative defense and finding that plaintiffs offered no evidence to rebut the affirmative defense of good faith; (3) not applying the law-of-the-case doctrine respecting its order entered December 16, 2008; and (4) receiving exhibits 170 and 171 at the hearing on the motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming it went uncontested at trial, would entitle the party to a favorable verdict. *Id.* If the moving party makes such a case, the burden then shifts to the nonmoving party to avoid summary judgment by producing admissible contradictory evidence which raises a genuine issue of material fact. *Id.*

In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Id.* On questions of law, an appellate

court is obligated to reach a conclusion independent of the determination reached by the court below. *Id*.

ANALYSIS

LAW-OF-THE-CASE DOCTRINE

The plaintiffs argue that the district court erred in not applying the law-of-the-case doctrine with respect to its order entered December 16, 2008. In such order, the district court denied the motions for summary judgment filed by the Bank, Franzen, and Widick after finding that the principles of qualified immunity which absolved Rupp from liability did not automatically apply to the Bank, Franzen, and Widick, and the district court declined to extend our decision in *Norby II* to parties other than Rupp.

In *Carpenter v. Cullan*, 254 Neb. 925, 934-35, 581 N.W.2d 72, 79 (1998), the Nebraska Supreme Court said:

> Under the law-of-the-case doctrine, all matters which expressly or by necessary implication are adjudicated by an appellate court become the law of the case on remand for a new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial.

In other words, "[t]he law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit." *Houston v. Metrovision, Inc.*, 267 Neb. 730, 734, 677 N.W.2d 139, 143 (2004).

The law-of-the case doctrine, by itself, does not prevent the trial court from granting the summary judgments that the plaintiffs challenge in this appeal. This is simply because the December 16, 2008, order denying the summary judgment motions of the Bank, Franzen, and Widick was not a final order. See *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003) (denial of motion for summary judgment is not final order). Thus, it is only when a question in controversy has been finally decided that such decision becomes the law of the case and is binding on the parties in all subsequent stages of the litigation. See *Wasserburger v. Coffee*, 201 Neb. 416, 267 N.W.2d 760 (1978). The denial of a motion for summary judgment has been described as an interlocutory order and, therefore, not appealable. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). See, also, *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989) (interlocutory orders may be modified at subsequent terms of court provided court still has not rendered final decision in matters still pending); *Tady v. Warta*, 111 Neb. 521, 196 N.W. 901 (1924) (no court is required to persist in error, and, if court concludes that former ruling was wrong, court may correct it at any time while case is still under court's control). Because the December 16 order was not the law-of-the-case as to these defendants regarding the remaining § 1983 claim, this assignment of error is without merit.

42 U.S.C. § 1983

The plaintiffs' operative petition alleged that the "acts and omissions of the Defendants, and each of them, is a deprivation of the Plaintiffs' interests in their property as hereinabove

alleged, without due process of law, and under color of law, in accordance with Title 42, U.S.C., § 1983 . . . ." Section 1983 provides, as relevant:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

In any § 1983 action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008), quoting *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). However, here the remaining defendants are private citizens and a corporate entity, and thus, we must first articulate how such fact impacts the proof of the above two key components in a § 1983 action. The U.S. Supreme Court has addressed this issue in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982):

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Our Supreme Court, following *Lugar v. Edmondson Oil Co., supra*, set forth what must be proved for a viable § 1983 claim against private citizens as follows in *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 483, 658 N.W.2d 258, 268 (2003):

> [W]hen the claim of a constitutional deprivation is directed against a private party, a two-part inquiry is required. The first question is whether the claimed deprivation has resulted from the exercise of a right of privilege having its source in state authority. The second question is whether, under the facts of the case, a defendant who is a private party may be appropriately characterized as a "state actor."

Therefore, when, as here, the § 1983 claim is against a private party, a two-part inquiry is required: (1) whether the claimed deprivation has resulted from the exercise of a right of privilege having its source in state authority and (2) whether the private party may be appropriately characterized as a "state actor."

In the instant case, the Bank, Franzen, and Widick used the Nebraska statutory provisions for replevin "to deprive" the plaintiffs of their property. However, the district court found that the plaintiffs "do not allege the replevin statues are unconstitutional, nor do they allege unconstitutional procedures were used to obtain the replevin order." The significance of these findings is exemplified by *Earnest v. Lowentritt*, 690 F.2d 1198, 1201 (5th Cir. 1982), where the Fifth Circuit Court discussed the law applicable to § 1983 claims based on property deprivations having its source in state law or authority:

> The Supreme Court has characterized the private use of state legal procedures for purposes of the Fourteenth Amendment as attributable to the state only in situations where the state has created a system which allows state officials to attach property on *ex parte* application. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (state created garnishment procedure); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (execution of a vendor's lien to secure disputed property); *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (stated created garnishment procedures); *Lugar v. Edmondson Oil Co.*, [457] U.S. [922], 102 S.Ct. 2744, 73 L.Ed.2d 482 (1981), (state replevin statute). A recent decision of this Court is illustrative. In *Hollis v. Itawamba County Loans*, [657 F.2d 746 (5th Cir. 1981),] an automobile buyer who claimed that his car was seized from him by an abuse of the state replevin proceedings was held to have stated a presumptively valid § 1983 claim for damages through improper use of state power. 657 F.2d at 750. In *Hollis*, unlike the situation in the present case, the creditor was acting pursuant to a state statute which permitted pre-judgment seizure of property without benefit of a hearing. It is in these *ex parte, prejudgment* situations that the courts have found the state is itself participating in the deprivation of property, and the constitutional requirements of due process apply. Private misuse of a state statute alone does not describe conduct that can be attributed to the state. It is the procedural scheme created by the statute that is state action, and therefore subject to constitutional restraints. *Lugar v. Edmondson Oil Co., supra.* The absence of a full adversary adjudication prior to seizure triggers the constitutional due process issue since state officers typically act jointly with a private creditor in securing the property in dispute.

The sort of § 1983 action alleged here requires that the state actor's conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. In the instant case, the plaintiffs argue that the Bank, Franzen, and Widick took livestock owned by parties other than Keith without due process of law (14th Amendment).

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

Due process "'guarantees "no particular form of procedure."'" *Lewis Service Center, Inc. v. Mack Financial Corp.*, 696 F.2d 66, 68 (8th Cir. 1982), quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). Rather, due process analysis necessitates a balancing of the creditor's interest in protecting his property rights and the debtor's interest in

avoiding a wrongful seizure. *Lewis Service Center, Inc. v. Mack Financial Corp., supra*. The fundamental requirement of due process is the *opportunity* to be heard at a meaningful time and in a meaningful manner. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). And "even an unauthorized intentional deprivation of property by a state official does not violate due process requirements if a meaningful post-deprivation remedy is available." *Hubenthal v. County of Winona*, 751 F.2d 243, 246 (8th Cir. 1984), citing *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

Due process of law with respect to property has been delineated in *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999), as the concept that the State cannot deprive any person of life, liberty, or property without due process of law. The court in *Prime Realty Dev.* further stated:

> The protections of this procedural due process right attach when there has been a deprivation of a significant property interest. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993), citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997).

258 Neb. at 76, 602 N.W.2d at 16. Because the Bank, Franzen, and Widick's action in taking possession of the livestock had its genesis solely in the replevin actions filed against Keith Norby by the Bank pursuant to a security agreement, we briefly examine the nature of a replevin action.

The court in *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986), reiterated previous holdings that the subject matter of a replevin action is very narrow. "[T]he issue in replevin is not *ownership* of the property . . . but the *right to immediate possession at the time of the commencement of the action*." *Id.* at 712, 386 N.W.2d at 457-58 (emphasis in original). Therefore, it is clear that the replevin action filed by the Bank determined the right to possession of the livestock at the time the replevin action was commenced.

However, "'[a] party who claims to be the owner of goods which are in controversy in an action of replevin may intervene in the case, upon filing a petition before judgment alleging his ownership.'" *Coomes v. Drinkwalter*, 183 Neb. 564, 566, 162 N.W.2d 533, 536 (1968). Therefore, the plaintiffs were provided a statutory right and an opportunity for a hearing on their ownership claim in the replevin action. And the record reflects that at least some of the plaintiffs did in fact exercise their right to intervention--we have Rupp's report notifying the court that Virginia Norby, Darin Norby, and Coleen Davis (Virginia Norby's sister and partner in V.C.V.D.) were intervening claimants. And the "stipulation for dismissal" (discussed in *Norby I*) regarding the replevin action and the petition in intervention upon certain conditions being met shows V.C.V.D. (signed by Virginia Norby as president) and Darin Norby as intervenors. It does not appear that KG Triple D Farms Trust (of which Virginia Norby is a trustee) intervened, although it certainly had the right to intervene if it wanted to claim ownership of the cattle seized per the replevin order. Having the right to intervene provided the plaintiffs adequate due process protection, and that right was in fact exercised. And without a due process violation, the plaintiffs' § 1983 claim ultimately fails.

Additionally, private citizens, such as the defendants, who merely invoke state statutory procedures against other private citizens are not necessarily exposed to § 1983 liability unless the "procedural scheme" under which action is instituted is constitutionally deficient. See *Lugar v. Edmondson Oil Co., supra* (petitioner did present valid cause of action under § 1983 insofar as he challenged constitutionality of statute; he did not insofar as he alleged only misuse or abuse of statue). There is no authority that Nebraska's current replevin statutes are constitutionally deficient, nor do the plaintiffs challenge the constitutionality of such statutes, as was noted by the district court. Moreover, Nebraska's replevin statute at Neb. Rev. Stat. § 25-1093.02 (Reissue 2008) clearly requires the issuance of a temporary order that must be based on the instigating party's affidavit. This temporary order merely requires the possessor of the property to hold and preserve such until "a hearing will be had and [the order must specify] the date, time, and place of such hearing, at which hearing will be determined plaintiff's right to possession of the goods described in plaintiff's affidavit and request for delivery, pending final determination of the merits." *Id.* Accordingly, our replevin statutes do not allow for the ex parte attachment or seizure of property, and they provide an opportunity for the holder of the property to be heard on the fundamental issue of who is entitled to possession of the property before there is a seizure. And as discussed above, others claiming the property at issue have the right to intervene.

Therefore, given that the defendants proceeded under a replevin statute that provided an opportunity for a preseizure judicial determination of entitlement to possession of the property at issue, we conclude that the defendants' use of state legal procedures does not run afoul of the fundamental 14th Amendment due process requirements of a preseizure notice and opportunity to be heard. Nebraska statutes under which the defendants acted do not allow private individuals to seize property on an ex parte application, and thus are not constitutionally defective. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969). As a result, as a matter of law, the claimed deprivation was not a deprivation of property in violation of a federal constitutional right. Because this prerequisite for a viable § 1983 action against private parties is not satisfied, the district court did not err in granting summary judgment to the defendants. Consequently, we need not engage in the analysis of whether the defendants were "state actors" nor do we need to engage in the analysis of the defendants' entitlement to the "good faith" defense. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007). Accordingly, the district court's order dismissing the plaintiffs' § 1983 action against the defendants is affirmed.

AFFIRMED.